



## INTERIOR BOARD OF INDIAN APPEALS

Sherry Wilson Price v. Portland Area Director, Bureau of Indian Affairs

18 IBIA 272 (05/01/1990)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
4015 WILSON BOULEVARD  
ARLINGTON, VA 22203

SHERRY WILSON PRICE

v.

PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 89-86-A

Decided May 1, 1990

Appeal from a denial of an Indian Business Development Program grant application.

Vacated; referred to Assistant Secretary - Indian Affairs.

1. Board of Indian Appeals: Jurisdiction

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to award money damages against the Bureau of Indian Affairs.

2. Administrative Procedure: Generally--Bureau of Indian Affairs:  
Administrative Appeals: Discretionary Decisions--Indians:  
Economic Enterprises

Under the circumstances of this case, in which, inter alia, a grant application under the Indian Business Development Program was disapproved on grounds not communicated to the applicant in the disapproval notification, the disapproval will be vacated and the matter referred to the Assistant Secretary - Indian Affairs for the exercise of discretion committed to the Bureau of Indian Affairs and the issuance of a new decision.

APPEARANCES: Sherry Wilson Price, pro se; Colleen Kelley, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for appellee.

## OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Sherry Wilson Price seeks review of a July 6, 1989, decision of the Portland Area Director, Bureau of Indian Affairs (BIA; appellee), denying her application for a grant under the Indian Business Development Program (IBDP). For the reasons set forth below, the Board

vacates that decision and refers this case to the Assistant Secretary - Indian Affairs for the exercise of discretion committed to the Bureau of Indian Affairs.

### Background

On March 24, 1989, appellant, an enrolled member of the Yakima Indian Nation, submitted to the Puget Sound Agency (agency), BIA, an application for an IBDP grant in the amount of \$35,000. Appellant sought the grant to purchase an additional fishing boat and tender, purchase inventory, acquire operating capital, and build permanent facilities in order to expand her existing fishing operation. The application was later amended.

On March 31, 1989, the agency sent appellant a letter which stated that appellant's application was "being approved subject to final review of [her] application." However, on May 5, 1989, the Superintendent informed appellant that the grant was not approved because "your total assets indicate that you have sufficient collateral to secure all funds required for your second fishing vessel without the assistance of grant equity."

Appellant appealed this decision to appellee who, on July 6, 1989, affirmed the denial of the grant application. Appellee's denial letter states at page 1:

The Superintendent based his decision on 25 CFR 286.17(a) which states, "grants will be made to assist in establishing new economic enterprises or in purchasing or expanding established ones. However, a grant may be made only when in the opinion of the Commissioner the applicant is unable to obtain adequate financing from other sources such as banks, Farmers Home Administration, Production Credit Associations, Federal Land Banks, and is unable to obtain a guaranteed or insured loan under Title II of the Indian Financing Act of 1974."

Upon receipt of your application and appeal at the Area Office, it was pointed out to you and your accountant that there were a number of discrepancies in your application. It was stated that you did not understand the application format. Explanations were provided and other assistance was provided as required to assist you in the development of your appeal.

Information provided and your ability to provide required information through the use of an accounting firm, plus your available assets only tends to substantiate the Puget Sound Agency Superintendent's decision on your Indian Business Development grant application that funding should be available through other sources.

The Board received appellant's appeal from this decision on July 31, 1989. Both appellant and appellee filed briefs on appeal.

### Contentions of the Parties

Appellant argues: (1) Under 80 Bureau of Indians Affairs Manual (BIAM) 3.5A, 1/ a tentative letter of approval of a grant application, without conditions for the applicant to meet, operates as a final letter of approval; (2) 80 BIAM 1.8 2/ requires that a grant applicant be given an opportunity to resolve any questions of financial need before the application is rejected; (3) other applicants not meeting the qualifications set out in 25 CFR Part 286 and 80 BIAM received grants; and (4) appellee's decision was based on erroneous information concerning whether the Yakima Nation has litigated treaty fishing rights in Puget Sound, whether appellant had established fishing sites on the Columbia River which she had successfully fished in the past, and whether appellant had the experience and management expertise to run a successful fishing operation. Appellant asks that an evidentiary hearing be ordered because she does not believe appellee will voluntarily provide information which she further believes is in his possession and will support her case. Appellant apparently requested this information under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1982).

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1/ Section 3.5A states in pertinent part:

"Tentatively Approved Applications. When an application for grant is tentatively approved, the Superintendent shall execute a Miscellaneous Obligation Request, MOR, in the amount of the intended grant and submit it to the Area Finance Office for obligation of funds. The Superintendent will notify the applicant, in writing (two copies to the Area Office, one of which will be forwarded to the Central Office, Division of Financial Assistance) of the action taken as well as the reason therefor and will identify the items to be completed before approval can be final, as well as the date on which the tentative approval will expire. If the financial package is completed within the allotted time, final approval will be granted and the procedures of 80 BIAM 3.5B will be followed."

2/ Section 1.8 sets forth general limitations on grant approval. The section provides in part:

"A. Financial Need. Grants may be made only in cases where it has been determined that the applicant is unable to obtain adequate financing from other sources, including both commercial and governmental lenders, on reasonable terms and conditions. If it is questionable, in the opinion of the approving officer, whether the applicant can obtain additional financing, documented evidence of two bona fide attempts to do so, and the results, shall be required.

"Other circumstances being equal, the grant may then not exceed the amount required to attract adequate financing of the enterprise.

"B. Sources of Loan Funds. Grants may be made only in conjunction with financing from other sources, not to include the applicant's cash and/or other assets. Grant funds may be used to supplement loans made under 25 CFR 93 (guaranteed and insured loans) [now Part 103] only in cases where a project's financial need cannot be met with loans from usual commercial or governmental sources. Grants may be used to supplement loans made under provisions of 25 CFR 91 [now Part 101] only as a last source."

As relief, appellant seeks: (1) the approval of her \$35,000 IBDP grant application; (2) payment of attorney and accountant's fees; (3) damages in the amount of at least \$100,000 for her inability to participate in the 1989 fishing season; (4) reimbursement of \$585 paid to a marine surveyor for a survey of the boat she sought to purchase; and (5) whatever additional damages may be appropriate if it is determined that BIA officials have been guilty of misconduct, negligence, or criminal actions in the consideration of her grant application.

Appellee contends that: (1) the Board's review of this appeal is limited to a determination of whether proper consideration was given to all legal prerequisites to the exercise of discretion; (2) even if appellant provided documentation showing inability to obtain adequate alternative financing, the evaluation of that evidence is discretionary with appellee; (3) the allegation that irregularities have occurred in the administration of the IBDP program in the Portland Area Office is not a proper issue for consideration by the Board; (4) no court has adjudicated the fishing rights of the Yakima Tribe in Puget Sound; (5) an important issue in this case was the likelihood of success of appellant's business as described in the grant application and, although appellant was given an opportunity to refute the concerns raised by the Area Office staff and demonstrate that her proposed business would be successful, she failed to do so; (6) the Board is not the proper form in which to challenge an FOIA decision; and (7) the Board lacks jurisdiction to award money damages.

### Discussion and Conclusions

[1] The Board first addresses the relief appellant requests under items (3) and (5) above; *i.e.*, that she should be awarded money damages against BIA. The Board has previously considered its authority to award such damages. It has held that it is not a court of general jurisdiction, but rather has only that authority which is delegated to it by the Secretary of the Interior. The Board has been delegated the authority to review decisions of BIA officials; it has not been given authority to award money damages against BIA. Gillette v. Aberdeen Area Director, 14 IBIA 187 (1986); Lord v. Commissioner of Indian Affairs, 11 IBIA 51 (1983). Accordingly, the Board has no authority to consider appellant's claim for money damages.

In items (2) and (4) of her requested relief, appellant seeks reimbursement of fees allegedly paid to an attorney, an accountant, and a marine surveyor. The Board can only order the reimbursement of fees if such reimbursement is authorized by statute or regulation. The Board is not aware of any statute or regulation, and appellant has cited none, that allows reimbursement of fees paid to an accountant or marine surveyor under the circumstances of this case. Although attorney fees may, in appropriate cases, be paid under such statutes as the Equal Access to Justice Act, 5 U.S.C. § 504 (1982), appellant has not been represented by an attorney in this matter. Instead, appellant has appeared *pro se* at all stages of the proceeding. In order to claim attorney fees, appellant would have to allege that her filings were actually prepared by an attorney who did not sign them, or that she was otherwise advised by an attorney who did not

enter a formal appearance. The Board will not accept such an ex post facto statement concerning representation of a pro se appellant merely to claim attorney fees at the end of the administrative proceeding. Appellant's requests for reimbursement of fees paid to an attorney, an accountant, and a marine surveyor are denied.

It is not clear whether appellant is also asking the Board to review BIA's response to her FOIA request. The Board is not part of the agency review process for FOIA appeals. Procedures governing such appeals are set forth in 43 CFR Part 2. See Weaskus v. Portland Area Director, 18 IBIA 141 (1990).

Appellant's remaining requested relief, as well as her arguments, are addressed to the question of whether her IBDP grant application should have been approved.

The IBDP is authorized by Title IV of the Indian Financing Act of 1974, as amended, 25 U.S.C. §§ 1521-1524 (1982 and Supps). <sup>3/</sup> Regulations implementing the program are found in 25 CFR Part 286.

Appellant first argues that under 80 BIAM 3.5A, a tentative letter of approval of a grant application, without conditions for the applicant to meet operates as a final letter of approval. <sup>4/</sup> 80 BIAM 3.5 states:

Action on Applications. Area Directors will either grant tentative approval, approve, or disapprove applications for grants, or may redelegate such authority to Superintendents to the extent he deems appropriate after evaluation of each agency's capabilities. Authority to approve grants will not be redelegated by Area Directors where agencies are not and will not be adequately staffed by Credit or other personnel capable of proper administration of the program.

Appellant alleges that the March 31, 1989, letter from the agency to her is a tentative letter of approval.

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<sup>3/</sup> 25 U.S.C. § 1521 (1982) provides:

"There is established in the Department of the Interior the Indian Business Development Program whose purpose is to stimulate and increase Indian entrepreneurship and employment by providing equity capital through non-reimbursable grants made by the Secretary of the Interior to Indians and Indian tribes to establish and expand profit-making Indian-owned economic enterprises on or near reservations."

<sup>4/</sup> The Board has previously discussed, at great length, the fact that the BIAM is an internal operating manual that does not have the force and effect of law. See, e.g., Allen v. Navajo Area Director, 10 IBIA 146, 162-65, 89 I.D. 508, 517-18 (1982). These discussions have been in the context of attempts by BIA to enforce provisions of the BIAM against outside parties. In contrast, the Board has considered provisions of the BIAM when such provisions were cited in support of a party's position and against BIA. See, e.g., Honaghaahnii Marketing & Public Relations v. Navajo Area Director, 18 IBIA 144, 148 (1990).

The Board is unable to determine from the record before it whether the March 31, 1989, letter constituted tentative approval of appellant's grant application within the meaning of 80 BIAM 3.5A. This letter, which was signed by an agency official for the Superintendent, does not explicitly identify itself as constituting tentative approval under 80 BIAM 3.5A. The record does not disclose whether the agency took the additional steps set forth in section 3.5A, *i.e.*, whether the Superintendent executed and submitted to the Area Finance Office a Miscellaneous Obligation Request, and whether the Superintendent sent two copies of the letter to the Area Office. The March 31, 1989, letter did not contain a statement of why the action was taken, identify any items that needed to be completed before approval could be final, or specify the date on which the tentative approval would expire, all of which are required to be included in a tentative letter of approval by 80 BIAM 3.5A. Furthermore, the record does not discuss the meaning of the phrase "subject to final review" in the March 31, 1989, letter. Although it would appear that tentative approval of a grant application by an official authorized to approve such applications and without conditions to be fulfilled before final approval could be granted, would constitute approval of the application, the Board declines to make this holding under the uncertain circumstances of this case. This uncertainty, however, in addition to the other problems discussed in the remainder of this opinion, require that appellee's decision be vacated and a new decision issued after giving full consideration to the problems noted.

Appellant also argues that 80 BIAM 1.8 requires that she be given an opportunity to show her financial need before her application is rejected. In addition to 80 BIAM 1.8, which is quoted *supra*, 25 CFR 286.17 provides in pertinent part:

(a) Grants will be made to assist in establishing new economic enterprises, or in purchasing or expanding established ones. However, a grant may be made only when in the opinion of the Commissioner [of Indian Affairs] the applicant is unable to obtain adequate financing from other sources such as banks, Farmers Home Administration, Production Credit Associations, Federal Land Banks and, is also unable to obtain a guaranteed or insured loan under Title II of the Indian Financing Act of 1974 (88 Stat. 77). \* \* \* If the information in an application indicates that it may be possible for the applicant to obtain financing without a grant, the Commissioner may require the applicant to furnish letters from two customary lenders in the area, if available, who are making loans for similar purposes, showing whether or not they will make a loan to the applicant for the total financing needed without a grant.

Appellant submitted letters from two banks during the course of BIA consideration of her application. First Interstate Bank of Bremerton, Washington, denied credit to appellant and her husband on two occasions in 1989; the North Sound National Bank of Tacoma, Washington, denied credit because it did not finance fishing boats. On appeal, appellant furnished letters from five additional credit sources. These letters indicate she and her husband were turned down for credit by the Puget Sound National Bank of

Tacoma, Washington; Beneficial Washington, Inc., of Bremerton, Washington; Seafirst Bank of Seattle, Washington; and Sears. The fifth lending source, Farm Credit Services of Chehalis, Washington, indicated that it made loans for fishing vessels, but that the usual loan was only 50 percent of the purchase price of a used vessel.

Appellee contends that even if a grant applicant submits evidence that a loan has been denied, evaluation of that information is discretionary with BIA. In part for that reason, the Board has previously stayed proceedings before it in cases where an appellant has submitted additional evidence of loan denials on appeal, in order to allow BIA to consider whether the additional evidence would cause it to reverse its decision. See Gauthier v. Portland Area Director, Docket No. IBIA 90-21-A, Order of Mar. 27, 1990; Home Respiratory Services, Inc. v. Muskogee Area Director, Docket No. IBIA 90-2-A, Order of Mar. 20, 1990. Here, where the Board has determined that the grant disapproval must be vacated for other reasons, the additional information concerning the availability of loans from other sources should be reviewed in the course of issuing a new decision.

Appellant alleges that appellee's decision was based on incorrect information given to the Area Branch of Credit by the Area Branch of Fisheries. This information is contained in a 2-page handwritten note dated May 26, 1989. The note states:

A. Tribal enrollment, usual and accustomed areas

1. The Yakima Tribal members have no usual and accustomed fishing areas in Puget Sound or Hood Canal — only fresh water rivers to the East of Puget Sound.

2. Belfair [where appellant resides] is a town 8 miles S.W. of Bremerton, WA near the tip of Hood Canal. The 4,500 Indians living in this area are probably from various nearby Tribes such as Skokomish, Squaxin Island and Suquamish.

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C. Capability:

A 30 foot gillnet boat can harvest 5,000 fish in a single season — but this assumes an experienced crew, favorable weather, fishing techniques and season length.

D. Fishing sites on the Columbia River

1. The practice of registering a site by family name has been in existence for 40 years. To date all prime fishing sites are taken.

2. If this applicant has a site already, it is possible to gross \$100,000 in a single season.



E. Expected gross income of \$100,000

1. After paying crew, moving this boat from Puget Sound (where it is not authorized to fish) down to the Columbia, making boat payments and standard fuel costs I don't believe the net income will be more than \$15,000 annually.

2. The fish runs in Puget Sound are regulated according to new harvest allocation agreements. I don't believe the tribes up there will agree to allowing a Yakima boat in that area. [Emphasis in original.]

The note also lists average prices of salmon for Puget Sound and average catches and income for the Columbia River.

Appellant argues that appellee improperly based his decision on erroneous information contained in this note. Appellant contends she was not given an opportunity to respond to or refute any of the information in the note because she was not aware that appellee had considered the information until she received the note as part of the administrative record. Appellee's discussion of the information in the note in his answer brief supports the conclusion that he considered this information in reaching his decision. Appellee states at page 3 of his answer brief: "In this appeal, an important issue was the likelihood of success of appellant's business as described in the grant application. The basis for the Area Director's concern was the information generated by his staff's evaluation of the fishing business."

80 BIAM 1.8F provides:

Feasibility and Management. Grants may not be approved unless there is a reasonable probability of success of the enterprise. Grants may be made only when, in the opinion of the approving officer, there is assurance that the applicant can and will be provided with technical and management assistance commensurate with the current knowledge and management skills of the applicant and the nature of the enterprise.

Although the phrase "reasonable probability of success of the enterprise" does not appear in 25 CFR Part 286, a fair reading of that part indicates that grant funds are to be approved for enterprises that have such a reasonable likelihood of success.

Appellee states that he considered the likelihood of success of appellant's enterprise based upon an analysis performed by the Area Branch of Fisheries. It is clear from the note in the administrative record that the Fisheries official did not know appellant and based his discussion on general observations. An affidavit attached to appellee's answer brief states that the concerns raised by the Branch of Fisheries were discussed with appellant or her accountant. No written account of any such discussions is part of the record. Appellant addresses these concerns in her brief.

[2] The Board finds that it is not necessary to resolve these issues. Appellee denied appellant's grant application on one ground: the determination that appellant should be able to obtain financing through other sources. Appellee concluded: "Information provided and your ability to provide required information through the use of an accounting firm, plus your available assets only tends to substantiate the Puget Sound Agency Superintendent's decision on your Indian Business Development grant application that funding should be available through other sources." 5/ Appellee did not inform appellant that her grant application was being denied because he believed her enterprise had little likelihood of success, or because she lacked sufficient technical and/or management skills and assistance was not available. Although appellee exercises discretion in determining whether or not to approve a particular IBDP grant application, his discretion is not without limitation. It is an abuse of discretion and a violation of due process to disapprove a grant application on grounds that are not communicated to the applicant in the disapproval notification.

Under 43 CFR 4.337(b), 6/ the Board is authorized to refer a case requiring the exercise of further discretion to the Assistant Secretary - Indian Affairs. The Board finds that this case should be so referred. 7/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1 and 4.337(b), the Portland Area Director's July 6, 1989, decision is vacated and this case is referred to the Assistant Secretary - Indian Affairs for the exercise

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5/ Appellant alleges that appellee improperly used the fact that she employed an accountant in concluding that she should have been able to obtain financing through other sources. Appellant's ability to secure the services of an accountant is totally irrelevant to the question of whether she could obtain financing for the purchase of a fishing boat, and should not have been considered by appellee in reaching a decision on that question.

6/ Section 4.337(b) provides:

"Where the Board finds that one or more issues involved in an appeal or a matter referred to it were decided by the Bureau of Indian Affairs based upon the exercise of discretionary authority committed to the Bureau, and the Board has not otherwise been permitted to adjudicate the issue(s) pursuant to § 4.330(b) of this part, the Board shall dismiss the appeal as to the issue(s) or refer the issue(s) to the Assistant Secretary - Indian Affairs for further consideration."

7/ Appellant also argues that other grant applicants not meeting the requirements of 25 CFR Part 286 and 80 BIAM received grants from the Portland Area Office. Appellee responds that any alleged irregularities in the administration of the IBDP in the Portland Area Office are not proper issues for consideration by the Board. Because of the Board's disposition of this case, it does not address this question.

Appellant's request for an evidentiary hearing is denied.

of discretion vested in the Bureau of Indian Affairs and the issuance of a new decision on appellant's grant application.

//original signed

Kathryn A. Lynn  
Chief Administrative Judge

I concur:

//original signed

Anita Vogt  
Administrative Judge